

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES V. MCCLAIN III,

Plaintiff,

v.

1ST SECURITY BANK OF WASHINGTON et
al.,

Defendants.

Case No. C13-2277 RSM

ORDER ON MOTIONS AND
DISMISSAL

THIS MATTER comes before the Court upon Plaintiff's Motion for Default (Dkt. # 33), Defendants' Motion to Dismiss (Dkt. # 40), and Plaintiff's Motion for Order Directing Service by U.S. Marshals Service (Dkt. # 41). Plaintiff is proceeding *pro se* and *in forma pauperis* in this suit. Having considered the motions and opposition thereto and the remainder of the record, the Court denies Plaintiff's request for default and for U.S. Marshals Service and grants Defendants' Motion to dismiss this action without prejudice for failure to comply with Federal Rule of Civil Procedure 4(m).

PROCEDURAL BACKGROUND

Plaintiff submitted his *in forma pauperis* ("IFP") application and his proposed complaint to the Court on December 19, 2013. *See* Dkt. # 1. Plaintiff's Complaint alleges a range of state and federal law violations based on claimed unauthorized withholdings and transfers from his

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2 bank account in December 2009. *See* Dkt. # 5 (Compl.). The Court granted Plaintiff's IFP
3 application on December 23, 2013, and his Complaint was deemed filed the same day. *See* Dkt.
4 ## 4, 5. Accordingly, under Federal Rule of Civil Procedure 4(m), Plaintiff had 120 days, or until
5 April 22, 2014 to serve summons and a copy of his Complaint on all Defendants. *See* Fed. R.
6 Civ. P. 4(m), 4(c), 6(a).

7 On January 10, 2014, Plaintiff moved for default against Defendants, on whose behalf
8 counsel had entered an appearance. *See* Dkt. ## 8, 9. On January 27, 2014, the Court denied
9 Plaintiff's Motion, instructing Plaintiff that he had failed to comply with Local Civil Rule 55(a),
10 which requires that written notice be given to any defaulting party that had entered an
11 appearance in the action. *See* Dkt. # 10. In denying Plaintiff's Motion for Reconsideration and
12 renewed Motion for Default and Default Judgment on February 4, 2014, the Court further
13 explained to Plaintiff that he had failed to effect service in compliance with Federal Rule of Civil
14 Procedure 4, which requires that he serve all Defendants with a summons that is both signed by
15 the Clerk and bears the Court's seal, together with a copy of his Complaint. *See* Dkt. # 17 (citing
16 Fed. R. Civ. P. 4(a), (b), & (c); LCR 4(a)). The Court instructed Plaintiff to perfect service within
17 120 days of filing. *Id.* at p. 3. The Court pointed out the defects in service to Plaintiff again on
18 February 12, 2014 in denying a second motion for reconsideration. *See* Dkt. # 21.

19 Plaintiff filed the instant Motion for Default on April 7, 2014, asking again that default be
20 entered against all Defendants. Dkt. # 33. On May 27, 2014, Defendants moved to dismiss
21 Plaintiff's Complaint for failure to effect service over a month after the deadline to serve them
22 had lapsed. Dkt. # 40. The next day, Plaintiff filed a Motion requesting that the Court order the
23 U.S. Marshal's service to effect service of Plaintiff's summons and amended complaint. Dkt. #
24 41.

25 DISCUSSION

26 If a defendant is not served within 120 days of the filing of a complaint, the Court is
required to dismiss the action without prejudice or order that service be made within a specified

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2 time. Fed. R. Civ. P. 4(m). If the plaintiff shows good cause for his failure to timely serve, the
3 Court must extend the time for service. *Id.* The Ninth Circuit has explained that “at a minimum,”
4 a plaintiff must show “excusable neglect” in order to meet the “good cause” standard. *Boudette*
5 *v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991). In order to bring his excuse to the level of “good
6 cause,” the plaintiff may also be required to show that: (1) the party to be served personally
7 received actual notice of the lawsuit; (2) the defendant would suffer no prejudice; and (3)
8 plaintiff would be severely prejudiced if his complaint were dismissed. *Id.* (citing *Hart v. United*
9 *States*, 817 F.2d 78, 80-91 (9th Cir. 1987)).

10 Absent a showing of good cause, the Court has broad discretion to determine whether to
11 dismiss the action without prejudice or to order service within a specified period of time. The
12 Ninth Circuit has cited to the following factors as relevant to the Court’s assessment of whether
13 to dismiss an action for lack of prosecution: “(1) the public’s interest in expeditious resolution of
14 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants;
15 (4) the public policy favoring its disposition of cases on their merits [;] and (5) the availability of
16 less drastic sanctions.” *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (quoting *Henderson*
17 *v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).

18 In this instance, the Court determines that dismissal without prejudice is the appropriate
19 sanction for Plaintiff’s failure to effect service. There is no question that Plaintiff failed to timely
20 and properly serve Defendants despite multiple warnings by the Court, including specific
21 instructions as to the manner in which service must be effected and the 120-day time limit for
22 compliance. Plaintiff’s most recent Motion for Default demonstrates his continuing refusal to
23 follow the Court’s rules for service. *See* Dkt. # 33. He once again failed to provide Defendants,
24 who have entered their appearance in this case, with fourteen days advance written notice of his
25 intent to file the motion for default, as required by LCR 55(a). He also failed to show by affidavit
26 or otherwise that he had served Defendants in a manner authorized by Rule 4. Rather, he had
merely delivered a copy of the Complaint to defense counsel, with summons directed to

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2 counsel's law firm rather than to any of the Defendants. *See* Fed. R. Civ. P. 4(a)(1)(B) (requiring
3 that a summons be "directed to the defendants").

4 Plaintiff has also failed to show "good cause" for his failure to comply with Court Orders
5 and Rules in order to accomplish service within the applicable time limit. In his response to
6 Defendants' Motion to Dismiss, Plaintiff rehashes arguments from his previous Motions for
7 Reconsideration, contending that Defendants and the Court misinterpret what is required by Rule
8 4. Yet as Plaintiff himself notes, "neither actual notice nor simply naming the defendant in the
9 complaint will provide personal jurisdiction 'without substantial compliance with Rule 4.'" Dkt.
10 # 43, p. 2; *S.E.C. v. Ross*, 504 F.3d 1130, 1140 (9th Cir. 2007). The Court's ability to liberally
11 construe Rule 4 is limited by its inability to waive procedural defects where plaintiff has not
12 demonstrated his substantial compliance with the requirements for effecting service. *Id.*

13 Plaintiff has made no showing of excusable neglect and indeed failed to provide any
14 explanation for his inability or unwillingness to comply with Rule 4. He offers the single
15 specious argument that he interpreted an instruction in an email by Defendants' counsel,
16 informing Plaintiff that "all communication to any defendants should be addressed to the
17 undersigned," (*see* Dkt. # 18, Ex. 1) to mean that he should also serve summons and Complaint
18 on counsel. *See* Dkt. # 43, p. 3. Even if Plaintiff had so interpreted this email, he should have
19 been sufficiently disabused of this notion by the Court's repeated instructions to personally serve
20 Defendants. Further, Plaintiff has acted on his own behalf in prosecuting at least four other cases
21 in this District and cannot be heard to claim ignorance of this Court's Rules. *See* Cause No's.
22 2:02-cv-01679TSZ, 2:05-cv-00218JCC, 2:07-cv-00567RSM, 2:08-cv-00613RSM, 2:12-cv-
23 01.620RSM). Nor do Plaintiff's tardy efforts to accomplish service suffice to demonstrate good
24 cause. *See Colen v. U.S.*, 2008 WL 2051697 (C.D. Cal. 2008) ("Plaintiff's just-filed proofs of
25 service still do not evidence proper service in a timely manner.").

26 Rather, Plaintiff maintains that even if service was not accomplished, Defendants have
waived their ability to raise the issue. First, Plaintiff argues that Defendant's entry of Notice of

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2 Appearance and response to Motions for Default waives the service requirement. Dkt. # 43 at pp.
3 2-3. Plaintiff is mistaken, as Federal Rule of Civil Procedure 4(d) provides the procedures for
4 accomplishing waiver of service, of which Plaintiff has not attempted to avail himself. Plaintiff
5 further incorrectly argues that Defendants have waived their ability to request dismissal for
6 failure to comply with Rule 4(m) by failing to make this argument in their earlier filed briefs.
7 First, the cases that Plaintiff cites are inapposite. The Northern District of California found that a
8 defendant had waived his defense under Rule 4(m) for insufficient service of process for failure
9 to raise it in a previous motion to dismiss. *Rudolph v. UT Starcome, Inc.*, 2009 WL 248370, *3
10 (N.D. Cal. 2009). Unlike the defendant in *Rudolph*, Defendants have filed neither a prior Rule
11 12(b) motion to dismiss nor a responsive pleading in which they could have asserted this
12 defense. Second and more fundamentally, this defense did not become available to Defendants
13 until April 23, 2014, the day after the 120-day window to accomplish service had lapsed. *See,*
14 *e.g., Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983) (finding no waiver where
15 defense was not previously available); *cf. Lucas v. Natoli*, 891 F.2d 295 (9th Cir. 1989)
16 (explaining that the “purpose of Rule 12(h)(1) is to force litigants to challenge personal service
17 as the earliest possible time and not file a series of delaying 12(b) motions”).

18 Plaintiff’s request for U.S. Marshal service of summons and amended complaint comes
19 over a month too late to salvage his case. In order to obtain marshal service of a complaint, a
20 plaintiff proceeding IFP must make a timely request to the Court. *Boudette v. Barnette*, 923 F.2d
21 at 757. Where a litigant does not make such a timely request, he “remain[s] solely responsible for
22 timely service.” *Id.* Accordingly, Plaintiff’s untimely request for U.S. Marshal service cannot
23 overcome his failure to effect service within the allowable window. Nor does Plaintiff’s attempt
24 to belatedly serve an amended complaint excuse him from the requirement to accomplish service
25 within 120 days of the filing of his original complaint. The filing of an amended complaint does
26 not re-start the clock on service provided by Rule 4(m) except as to defendants that have been
newly added in the amended complaint. *Carr v. International Game Technology*, 770 F.Supp.2d

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2 1080 (D. Nev. 2011) (citing *Bolden v. City of Topeka*, 441 F.3d 1129, 1148 (10th Cir. 2006)).
3 Here, Plaintiff's amended complaint has not added new defendants, and it could not have
4 rewound the 120-day clock that began to toll in December 2013.

5 While the Court recognizes that it has discretion to extend the period for service in
6 certain circumstances, it does not find the exercise of this discretion to be warranted in the
7 instant case. Of the *Carey* factors discussed *supra*, the need for the Court to manage its docket
8 and the public's interest in expeditious resolution of litigation both clearly militate in favor of
9 dismissal. Further, a review of Plaintiff's Complaint does not show there to be a sufficient
10 likelihood of success on the merits to militate against dismissal. *Cf. United States v. 2,164*
11 *Watches*, 366 F.3d 767, 772 (9th Cir. 2004) ("The 1993 amendment to General Rule 4(m) gave
12 courts greater leeway to preserve meritorious lawsuits despite untimely service of process.").
13 While less drastic sanctions are available to the Court in the form of extending time for service
14 and directing it to be accomplished by the U.S. Marshals, the Court is not persuaded that this
15 factor overcomes those supporting dismissal.

16 In particular, the Court does not find that dismissal of Plaintiff's Complaint would
17 preclude him from prosecuting this action as a result of any applicable statutes of limitations.
18 Plaintiff's breach of contract claim for an action on a written contract is subject to a six-year
19 statute of limitations that, assuming no equitable tolling, would not expire until December 2015.
20 See RCW 4.16.040. The majority of Plaintiff's claims appear to be subject to a three-year statute
21 of limitations, which, assuming no equitable tolling, expired in December 2012, prior to the
22 initiation of this lawsuit. See, e.g., RCW 4.16.080 (specifying three-year statute of limitations for
23 an action for taking, detaining, or injuring personal property); *Southwick v. Seattle Police Officer*
24 *John Does # 1-5*, 145 Wash.App. 292, 297-98, 186 P.2d 1089 (2008) ("Since there is no statute
25 of limitations for claims under 42 U.S.C. § 1983, the appropriate limitation period for a § 1983
26 action is the forum state's statute of limitation for personal injury cases, which in Washington is
three years."). Should Plaintiff wish to continue prosecuting his claims, there is no indication that

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2 his ability to do so will be prejudiced by the requirement that he re-file his Complaint and
3 properly serve Defendants within the appropriate time period.
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5 **CONCLUSION**

6 Accordingly, the Court finds that Plaintiff has not shown good cause for his failure to
7 accomplish service within 120 days as provided by Rule 4(m) and that this case does not warrant
8 the exercise of the Court's discretion to extend the time for service. The Court therefore finds
9 and ORDERS as follows:

10 (1) Plaintiff's Motion for Default (Dkt. # 33) is DENIED.

11 (2) Defendants' Motion to Dismiss (Dkt. # 40) is GRANTED.

12 (3) Plaintiff's Motion for Order Directing U.S. Marshals Service of Summons and
13 Amended Complaint (Dkt. # 41) is DENIED.

14 (4) Plaintiff's case is hereby DISMISSED WITHOUT PREJUDICE pursuant to Federal
15 Rule of Civil Procedure 4(m).

16 DATED this 11th day of December 2014.

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18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
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